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Supreme Court, U.S.
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No. 04-989

In the

SUPREME COURT OF THE UNITED STATES

Sarah Jenkins Horton et al.,
Petitioners

v.

Bank One, N.A. et al.,
Respondents

On Petition for Writ of Certiorari
to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Introductory Statement:

Sarah Horton filed an action against "Bank One, N.A." and its various subsidiaries in state court in Bastrop, Texas alleging violations of federal and state consumer protection provisions and common law claims of fraud and theft stemming from a consumer car loan. Bank One answered the suit and counter claimed for collection on the loan. Bank One then removed the matter to the Federal Court for the Western District of Texas, Austin on the basis of diversity of citizenship. Horton moved to remand the matter to state court arguing that the District Court did not have diversity jurisdiction because 28 U.S.C. 1348 establishes that national banks are "citizens" of the states in which they operate branch offices. The District Court denied the motion to remand but certified that matter as appropriate for an interlocutory appeal. The Fifth Circuit agreed to hear the matter on an interlocutory basis. In an opinion filed October 5, 2004 the Fifth Circuit determined that 28 U.S.C. 1348 did *not* establish that national banks were "citizens" of the states in which they operate branches following the reasoning in the only other circuit opinion then to have addressed the issue, *First Star v. Faul,* 253 F.3d 982 (7th Cir. 2001). On November 1, 2004 the Fourth Circuit reached the opposite conclusion in *Wachovia v. Schmidt*, 388 F.3d 414 (4th Cir. 2004) an opinion which rejected the reasoning of both *First Star* and *Horton.* The Fourth Circuit found that 28 U.S.C. 1348 *does* establish that national banks are citizens of the states in which they operate branch offices.

Question Presented for Review:

Does 28 U.S.C. 1348 establish that national banks are citizens of the states in which they operate branch offices, thereby precluding diversity jurisdiction?

List of Parties to Proceeding:

Sarah Horton and George L. Matassarin
Plaintiffs /Counter-Defendants/Petitioners

Bank One, N.A.; Bank One Corporation and
Bank One Wisconsin
Defendants/Counter-Plaintiffs /Respondents

In or around January, 2004 the Defendants were purchased by or merged with JPMorganChase.

Counsel:

The Petitioners are represented by: Patricia J. Matassarin
San Antonio, Texas

The Respondents are represented by: Mr. Bradley J. Johnson
JPMorganChase
In-house counsel
Dallas, Texas

The Office of the Comptroller of the Currency, Washington, D.C. was an amicus on behalf of the banking industry in the underlying appeal.

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Federal Statute as issue:

28 U.S.C. 1348 1

Opinion Below:

On October 5, 2004 the Fifth Circuit Court of Appeals filed an opinion in *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) which found diversity jurisdiction was available to national banking associations to the same extent that it was available to corporations and state banks. The opinion rejected the contention that the legislative history behind 28 U.S.C. 1348 established Congressional intent to restrict rather than expand the diversity jurisdiction of federal courts and/or that Congress specifically intended to place national banks in jurisdictional parity with the state banks in the state of those banks' charter.

Jurisdictional Basis:

Appellate Jurisdiction in the United States Supreme Court is conferred by virtue of 28 U.S.C. 1254. Jurisdiction in the lower United States District Court for the Western District of Texas, Austin is disputed by Petitioners but was found by the Fifth Circuit to have been conferred by the U.S. Supreme Court by analogy to jurisdiction afforded corporations and state banks.

Applicable Statute: 28 U.S.C. 1348

> **The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to**

enjoin the Comptroller of the currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

Statement of the Case:

The facts underlying this dispute involve a trail installment contract for the purchase of a vehicle by Horton. In 2002, Horton filed suit against Bank one in Texas state court alleging violations of several consumer-protection-type statutes and asserting common-law claims. In February 2003, Bank One solicited a settlement offer from Horton. Bank One contends that the settlement offer gave notice to them, for the first time, that the amount in controversy exceeded $75,000. The offer reached the amount in controversy threshold because it also included attorney's fees. Bank One then removed the matter to Federal District Court for the Western District of Texas in Austin, Texas. Horton moved to remand arguing that there was no federal jurisdiction because complete diversity of citizenship was lacking. Horton relied on the "majority" view of District Courts that because bank One had branches in Texas, it was "located" in Texas and was thus a citizen of Texas pursuant to 28 U.S.C. 1348; that Texas law mandated that Bank One's collection action be brought in the county of Horton's residence; and that Texas law established that banking associations conducting banking business in Texas were deemed "domiciled" in Texas. After rejecting Horton's

reasoning and denying Horton's motion to remand, the District Court granted her motion to certify the matter for interlocutory appeal and the Fifth Circuit granted leave to appeal. The Office of the Comptroller of the Currency, Washington, D.C. appeared as an amicus on behalf of Bank One, N.A.

On October 5, 2004 the Fifth Circuit filed an opinion which followed the reasoning of *Firstar v. Faul,* 253 F.3d 982 (7th Cir. 2001) finding national banking associations were to have the same jurisdictional prerogatives as corporations and state banks operating outside of their charter states which affirmed the ruling of the District Court. However, on November 1, 2004 the Fourth Circuit Court of Appeals in *Wachovia Bank, National Association v. Schmidt III*, 388 F.3d 414 (4th Cir. 2004). found the opposite, opining the 28 U.S.C. 1348 establishes that national banking associations are deemed citizens of the states in which they operate branch offices. If the Fourth Circuit is correct, then no diversity exists between national banks and the citizens of states in which they operate, thusly destroying "diversity jurisdiction". That being so, then a judgment rendered in federal court would be void for lack of subject matter jurisdiction.

Considerations Governing Review:

There now exists a conflict of opinion between the Circuit Courts concerning the most fundamental question in jurisprudence, that of subject matter jurisdiction. This Court should resolve the conflict

Arguments and Authorities:

Bank One, N.A. and the OCC filed briefs which emphasized that the intent of Congress should control in determining just what was intended with the use of the word "located" in 28 U.S.C. 1348. The OCC had also appeared as an amicus on behalf of Firstar Bank in that Seventh Circuit case. *Firstar,* however, did not address the Congressional record advanced by Horton which clearly indicated that the intent of Congress in limiting the access to federal courts by national banking associations in the legislation which ultimately became 28 U.S.C. 1348, was to create jurisdictional parity with the state banks operating along side those national banks in the state of those state banks' charter. I.E., " . . . that a national bank doing business within a certain state shall be subject for all purposes of jurisdiction to precisely the same regulations to which a State bank, if organized there, would be subject." (See Appendix, pg. 11a) A state bank organized in Texas would be a Texas citizen and could not assert diversity jurisdiction in this instance. Thus, a national bank "located" in Texas should be deemed a Texas citizen and likewise cannot assert diversity jurisdiction against a Texas citizen.

Both *Firstar* and *Horton* found the specific intent referenced above insignificant in the face of case law they assert mandates jurisdictional parity for national banking associations with state banks operating outside their charter states (interstate) and corporations. This position effectively destroys any parity with state banks operating inside their charter states. Texas state banks must stand and defend consumer protection actions and prosecute their collection

actions in the counties of the debtor's residence, before state judges subject to reelection in those counties, whereas, the few out of state banks operating in Texas and national banking associations may remove their cases to far away federal tribunals. Defending collection actions in metropolitan areas miles and miles from the debtor's residence makes prosecuting or defending actions involving a national banking association difficult and remote for most consumers. They are forced to expend the resources necessary to litigate in federal court -- which are generally more costly than state court litigation in the counties of their residences.

Both *Firstar* and *Horton* expand federal court diversity jurisdiction contrary to Supreme Court precedent. They contend that jurisdictional parity with corporations is mandated. That finding, however, is contrary to *Carden et al., v. Arkoma Associates,* 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). The Court stated: " . . . While the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have . . . just as firmly resisted extending that treatment to other entities". Id. at 189. The Carden Court made it clear that diversity jurisdiction was not to be expanded for other "artificial entities" as had been done for corporations. The opinion establishes that diversity jurisdiction may not be expanded by implication or by analogy. Yet, *Firstar* and *Horton* have done just that -- expanded federal diversity jurisdiction by arguing that legislative action and inaction, analyzed by case law, "imply" that national banking associations (artificial entities) must be afforded the same jurisdictional prerogatives as the first artificial entity to be afforded diversity jurisdiction, corporations.

Wachovia, after analyzing arguments advanced in *Firstar*, and *Horton* has brought the issue full circle by weighing in favor of the statutory construction analysis of the case establishing the District Court majority view (prior to the Seventh Circuit's *Firstar*), *Connecticut Nat'l Bank v. Iacono*, 785 F.Supp. 30 (D.R.I. 1992). The thrust of the analysis is that 28 U.S.C. 1348 uses two separate terms to refer to a site, "established" and "located". Common sense or common usage of "established" denotes a site of creation or conception whereas "location" denotes physical presence. Thus, the express statement of 1348 which states that national banking associations are to be deemed citizens of the place of their "locations" restricts diversity, rather than expands it. *Wachovia* and *Carden* are in accord with one another and are in accord with the legislative intent statement advanced in *Horton*. This position protects the individual consumer interests at stake; accommodates federalism concerns; and restricts the plethora of collection cases that are encouraged to be brought in federal courts by *Firstar* and *Horton*. Amount in controversy is easily established with even the most minimal installment contract because attorney fees (federal litigator fees) are included in the amount total. All national banking associations have to do to run up the fees is to give consumers' counsel the run- a- round for a short period and fees bring the amount in controversy up to the total required in short order.

WHEREFORE, by reason of the above and foregoing Petitioners respectfully pray that this Honorable Court will grant certiorari to resolve the important issue presented.

RESPECTFULLY SUBMITTED:

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United States Court of Appeals
Fifth Circuit
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Clerk

In the United State Court of Appeals
For the Fifth Circuit

No. 03-50865

SARAH JENKINS HORTON;
GEORGE LEON MATASSARIN,
Plaintiffs-Counter
Defendants-Appellants,

versus

BANK ONE, N.A.;
Defendant-Counter Claimant-Appellee,
BANK ONE CORPORATION;
BANK ONE WISCONSIN,
Defendants-Appellees.

Appeal from the United States District Court
for the Western district of Texas

Before GARWOOD, HIGGINBOTHAM, and SMITH,
Circuit Judges.

PATRICK E. HIGGINBOTHAM, CIRCUIT JUDGE:

Sarah Jenkins Horton appeals the district court's rejection of her contention that for purposes of its diversity jurisdiction, a national bank is a citizen of each and every state in which it has a branch. We affirm.

I

The facts underlying this dispute involve a retail installment contract for the purchase of a vehicle by Horton. In 2002, Horton filed suit against Bank One in Texas state court alleging violations of several consumer-protection-type statues and asserting several common-law claims. IN February, 2003, Horton sent a settlement offer to Bank One. This offer put Bank One on notice for the first time that the amount in controversy exceeded $75,000. Bank One immediately removed the case to federal district court. Horton moved to remand arguing that there was no federal jurisdiction because complete diversity of citizenship was lacking. Horton reasoned that, because Bank One had branches in Texas, it was "located" in Texas and was thus a citizen of Texas. After rejecting Horton's reasoning and denying Horton's motion to remand, the district court granted her motion to certify the order for interlocutory appeal and we granted leave to appeal. The specific issue certified for this appeal is whether national banking associations are citizens of every state in which they have a branch.

II

We have jurisdiction[1] and we review *de novo* the district court's finding of jurisdiction.[2]

28 U.S.C. [section] 1348 provides that for purposes of diversity jurisdiction, "[a]ll national banking associations shall . . . be deemed citizens of the State in which they are respectively located." We must decide the meaning of "located." Horton argues that Bank One is a citizen [of] Texas because it has branches in Texas, while Bank One claims that it is a citizen only of Illinois - the state of its principal place of business and the state listed in its organization certificate.

Until recently no circuit had addressed the meaning of "located" in section 1348. Prior to 1992, the "unquestioned" and "longstanding interpretaion" was that "located" did *not* include the branches of a national bank.[3]

From 1992 to 2001, the majority of district courts that addressed this issue concluded that under section 1348, a branch,[4] led by the District of Rhode Island's opinion in

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[1]See 28 U.S.C. [section] 1292(b). .

[2] *Union Planters Bank Nat'l Ass'n v. Salih*, 369 F.3d 457,460 (5th Cir. 2004).

[3] *Baker v. First Am. Nat'l Bank*, 111 F.Supp.2d 799,800 (W.D. La. 2000); see also *Fin. Software Sys. v. First Union Nat'l Bank*, 84 F.Supp.2d 594,602 (E.D. Pa. 1999)

[4] *Firstar Bank, N.A. v. Faul*, 253 F.3d 982,985(7th Cir. 2001)

Connecticut National Bank v. Iacono.[5] Pointing to a Supreme Court case in 1977 and changes in the law involving national banks, the court in *Iacono* decided to reexamine the meaning of "located," even though a 1943 case "appear[ed] to have settled the matter."[6] A minority of district courts, however, remained unpersuaded by *Iacono's* analysis and conclusion.[7]

In 2001, the Seventh Circuit in *Firstar* held that "for purposes of 28 U.SC. [section] 1348 a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its organization certificate."[8] *Firstar* analyzed the text history, and purpose of section 1348 and its predecessors. While no other circuit has yet ruled on this issue, every district court that has since confronted it has agreed with *Firstar*.[9]

III

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[5]785 F.Supp. 30 (D.R.I. 1992)

[6]Id. at 31-32

[7]See, e.g., *Fin. Software Sys.,* 84 F.Supp.2d at 602-07; *Baker,* 111 F.Supp.2d at 800-01.

[8] *Firstar,* 253 F.3d at 994.

[9]See. e.g., *Adams v. Bank of Am., N.A.,* 317 F.Supp.2d 935, 941-42 (S.D. Iowa 2004); *Evergreen Forest Prods. of Ga., LLC v. Bank of Am., N.A.*, 262 F.Supp.2dd 1297, 1307 (M.D. Ala. 2003); *Bank One, N.A. v. Euro-Alamo Invs., Inc.*, 211 F.Supp.2d 808-810 (N.D. Tex. 2002) (agreeing with "well-reasoned *Firstar* Bank-line" of cases.)

We follow *Firstar's* holding that a national bank is not "located" in, and thus not a citizen of, every state in which it has a branch.

A

In construing another provision containing "located," the Supreme Court recognized that " [t]here is no enduring rigidity about the word 'located.'"[10] The language of section 1348 is therefore ambiguous, and this court "will look to legislative history to clarify the purpose" of the statute.[11]

"When . . . juridical interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statue indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."[12] Further, "courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version."[13]

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[10]*Citizens & S. Nat'l Bank v. Bougas*, 98 S.Ct. 88,93 (1977)
[11]*United Servs. Auto. Ass'n v. Perry,* 102 F.3d 144,149 (5th Cir. 1996) (per curiam).
[12]*Bragdon v. Abbott,* 118 S.Ct. 2196, 2208 (1998)
[13]*Firstar,* 253 F.3d at 988 (citing *Cotton Sav. Ass'n v. Comm'r*, 111 S.Ct. 1503, 1508-09 (1991) (stating that by leaving a statute "undisturbed through subsequent reenactments of the [Act}," the Court "may presume that Congress intended to codify [the related] principles" represented by the Court's contemporary decisions)).

B

Firstar found that the history of section 1348 and its predecessors makes plain Congress's intent to grant national banks and state banks and corporations equal access to diversity jurisdiction.[14] When national banks were first created in 1863, federal courts had jurisdiction over any suit involving a national bank.[15] In 1864, Congress added that any such case could also be brought in state court.[16]

In 1882, However, Congress trimmed federal jurisdiction over cases involving national banks:

> [T]he jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States , or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do nor might do banking business where such national-banking associations may be doing business when such suits may be begun . . . .[17]

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[14] *Firstar,* 253 F.3d at 988.

[15] Id. at 986 (citing *Petri v. Commercial Nat'l Bank of Chicago,* 12 S.Ct. 325,326 (1892)

[16] *Petri,* 12 S.Ct. at 326.

[17] Act of July 12, 1882, ch. 290, [sectionn] 4, 22 Stat. 162, 163 (emphasis added.).

The apparent purpose of the 1882 statute was to "eliminate automatic federal question jurisdiction over all cases involving national banks."[18] In 1887, Congress superseded the 1882 Act and first used the phrase that appears today in section 1349. The 1887 Act proclaimed:

> [A]ll national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, *be deemed citizens of the States in which they are respectively located;* and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.[19]

The Supreme Court has concluded that the objective of the 1882 and 1887 Acts was to create jurisdictional parity between national banks on the one hand and state banks and corporations on the other. Interpreting the 1882 Act, the Supreme Court observed that it "was evidently intended to put national banks on the *same footing as the banks of the state* where they were located for all the purposes of the jurisdiction of the courts of the United. States."[20] For jurisdictional purposes, a national bank was placed "before

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[18] *Fin. Software Sys.,* 84 F.Supp.2d at 600 (citing *Leather Mfrs.' Nat'l Bank v. Cooper,* 7 S.Ct. 777,778 (1887)

[19] Act of March 3, 1887, ch. 373, [section] 4 , 24 Stat. 552, 554-55 (emphasis added.).

[20] *Leather Mfrs.' Nat'l Bank,* 7 S.Ct. at 7878 (emphasis added)

the law . . . the same as a bank not organized under the laws of the United States."[21]

In the judicial Code of 1911 Congress changed the structure of the jurisdictional provision of the 1887 Act, but retained its language regarding citizenship.[22] The design of the change was merely "to make the purpose of the re-enacted statute clearer" rather than to make a fundamental change.[23] Finally, in 1948 Congress amended the Judicial Code and enacted section 1348 in its present form.[24]

It is then plain that Congress enacted section 1348 against a backdrop of equal access to the federal courts for national banks, state banks, and corporations. Because section 1348 does not have any language modifying or rejecting the interpretive understanding that came with its predecessors,

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[21]Id.; see also *Mercantile Nat'l Bank v. Langdeau,* 83 S.Ct. 520, 526 (1963) ("Section 4 [of the 1882 Act] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." (emphasis added)); *Petri,* 12 S.Ct., at 327 ("No reasons is perceived why it should be held that [C]ongress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might.").

[22]*Fin. Software Sys.*, 84 F.Supp.2d at 600)

[23] *Herrmann v. Edwards,* 35 S.Ct. 839, 842 (1915). See also *Am. Sur. Co. v. Bank of Ca.*, 133 F.2d 160, 161-162 (9th Cir. 1943) (holding national bank with branch in Oregon was not citizen thereof for diversity purposes under predecessor of section 1348).

[24]See Act of June 25, 1948, ch. 646, 62 Stat. 933.

this court should presume that Congress intended to retain and incorporate the existing interpretive backdrop.[25] It follows that we should read section 1348 as retaining its objective of jurisdictional parity for national banks vis-a-vis state banks and corporations.

C

We are persuaded that this goal of jurisdictional parity is best served by interpreting "located" as referring to a national bank's principal place of business as well as the state specified in the bank's articles of association.[26] Since a bank, under 28 U.S.C. [section] 1332(c)(1), may be a citizen of no more than two states- the state where its principal place of business it located and its state of incorporation - maintaining jurisdictional parity between a national and state bank requires that the national bank have no more than two possible states of citizenship.[27]

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[25]See *Bragdon,* 118 S.Ct. at 2208; Cotton Sav. Ass'n, 111 S.Ct. at 1508-09.

[26]*Firstar* held that a national bank is located in, and therefore a citizen of, the state of its principal place of business and the state listed in its organization certificate.

[27]*Firstar*, 252 F.3d at 994. The OCC filed an amicus brief in *Firstar,* as it has in this case. Id. at 984. Following *Firstar* the OCC issued an interpretive letter reaffirming its support of "the interpretation of the statute and fundamental reasoning: of the *Firstar* court. OCC Interpretive Letter No. 952, 2002 WL 32072482, at *4 (Oct. 23, 2002).

The OCC, however, indicated that *Firstar's* "use of the state listed in the organization certificate as the analogue to the state of incorporation was incomplete" and that a more

Horton's position - that the national bank would be located in, and therefore a citizen of, each state in which it has a branch - would restrict a national bank's access to federal court under diversity jurisdiction, without similarly restricting a state bank.

D

Horton accepts that parity was intended, but offers a quite different view of what that parity is. Horton argues that Bank One does not seek the parity that Congress intended to achieve with the 1882 and 1887 Acts. Horton point to *Mercantile National Bank v. Langdeau,* deciding venue in

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thorough articulation of the position would be that "a national bank is a citizen of the state in which its principal place of business is located and of the state that was originally designated in its organization certificate and articles of association or . . . the state to which that designation has been changed under other authority.". Id.

In a recent case construing section 1348, a district court held "that a national bank is 'located' in, and thus a citizen of, the state of its principal place of business and the state listed in its most recent articles of association." *Evergeeen,* 262 F.Supp.2d at 1307.

While the OCC's position and evergreen do represent a more complete holding than that in *Firstar*, because Illinois is the state of Bank One's principal place of business, the state listed on its organization certificate, and the state listed in its most recent articles of association, it is not necessary to decide whether to a use the "organization certificate" test or the "articles of association" test.

state courts for suits against national banks.[28] In determining whether the jurisdictional provision of the 1882 Act had implicitly repealed earlier an venue provision, the Supreme Court explained that "[s]ection 4 apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."[29] In coming to this conclusion, the Court quoted from the Congressional Record:

> The proviso to [section] 4 of the 1882 Act first appeared as an amendment offered on the floor of the House by Representative Hammond, pursuant to the order of the House fixing the assignment of the bill H.R. 4167 as a special order See 13 Cong. Rec. 3900, 3901. Mr. Hammond succinctly stated the purpose of his amendment as follows: "My amendment, herefore, declares that the jurisdictional limits for and as to a national bank shall be the same as they would be in regard to a *State* bank *actually doing or which might be doing business by its side;* that they shall be one and the same." 13 Cong.. Rec., at 4049. Mr. Robinson then asked, "as I understand the gentleman's proposed amendment, it is simply simply to this effect, that a *national bank doing business within a certain State shall* be subject for all purposes of jurisdiction to precisely the same regulations to which a *State bank, if organized there,* would be subject." Mr.

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[28]83 S.Ct. at 521-22.
[29]Id. at 526.

Hammond replied, "That is all." Ibid.[30]

Horton argues that this quote from the Congressional Record evidences Congress's intent to treat national banks as citizens of the state in which they are "doing business," so that national banks would have jurisdictional parity within a particular state with the state banks chartered in that state. "Doing business within a certain State," according to Horton, includes the national bank's branches and would result in the national bank's being treated as a citizen of each state where it has a branch. Horton asserts that his approach achieves the parity Congress intended: a state bank organized in Texas, being a Texas citizen, would not be able to invoke diversity jurisdiction in a suit against a Texas citizen; hence, a national bank located or doing business in Texas, but presumably with its principal place of business and organization certificate in another state, should also not be able to invoke diversity jurisdiction against a Texas citizen.

Horton's reading of history is incomplete. At the time of the 1882 Act, indeed until 1927, national banks were not permitted to engage in branch banking - intrastate or interstate.[31] Therefore, the statement from the Congressional Record it not evidence that "located," or "doing business within a certain State., " means something more than principal place of business: All national banks in 1882 were doing business only in the state of their principal place of business.

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[30]Id. at 526 n. 22 (emphasis added)

[31]*Bougas*, 98 S.Ct. at 93; *Fin. Software Sys.*, 84 F.Supp.2d at 601-02.

Horton's position also ignores the Supreme Court's declarations that"[n]o reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations: might, [32] and that "[a] national bank was by [the statue of 1882] placed before the law [for purposes of federal jurisdiction] the same as" non-national banks.[33] A national bank with its principal place of business and organization certificate in Illinois could hardly be treated the same before the law if a corporation from Illinois with a "branch" in Texas could get into federal court when sued by a citizen of Texas while the national bank, also with a branch in Texas, would not.

Finally, Horton's position would lead to a narrow concept of "parity." The national bank would enjoy access to diversity jurisdiction only when sued by or suing a citizen of a state in which the bank maintains no branch at all. Corporations and state banks do not have such a limited access to federal court.

E

Firstar and other courts have addressed the arguments upon which the *Iacono* court relied and expressly rejected *Iacono's* reasoning and conclusion.[34] Horton does not attempt to resurrect any of these rejected *Iacono* arguments, citing *Iacono* only once - to argue that *Iacono* represents the majority view.

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[32]*Petri,* 12 S.Ct. at 327
[33]*Leather Mfrs.' Nat'l Bank,* 7 S.Ct. at 778.
[34]*Firstar*, 253 F.3d at 989-93; *Fin. Software Sys.*, 84 F.Supp.2d at 604-07.

Iacono relied heavily on *Citizens & Southern National Bank v. Bougas,*[35] in which the Supreme Court read "located," for purposes of a venue provision of the National Banking Act to include the location of the bank's branches.[36] Bougas, however, does not construe section 1348 and merely points out in a footnote, with no further comment, that section 1348 uses the word "located." Because "[v]enue is distinct from jurisdiction."[37] and because *Bougas* expressly limits its opinion to how the federal statue applied in determining state court venue, using *Bougas* to interpret "located" in a jurisdictional statue is of questionably (sic)validity, if applicable at all.[38]

If *Iacono* also failed to recognize that the provision interpreted in *Bougas* was included in the National Banking Act,[39] and that section 1348 is found in the Judicial Code and Judiciary Act.[40] This undermines the rationale for using the venue provision construed by *Bougas* to aid in the interpretation of a jurisdictional statute, particularly when the same word can have different meanings - even within the

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[35]98 S.Ct. 88 (1977)

[36]*Iacono*, 785 S.Supp. at 32-34 (stating that *Bougas's* mention of section 1348 suggested that the Supreme Could (sic)would construe "located" in section 1348 as it had in *Bougas*); *Bougas,* 98 S.Ct. at 89-94.

[37]*Driscoll v. New Orleans Steamboat Co.*, 633 F.2d 1158, 1159 n.1 (5th Cir. 1981)

[38]*Firstar,* 253 F.3d at 989-91.

[39]12 U.S.C. [section] 21 et seq.

[40]28 U.S.C. [section] 1, et seq.; see also *Firstar,* 253 F.3d at 990.

same act.[41] *Bougas* itself recognized that "[t]here is no enduring rigidity about the word 'located,'" thus significantly weakening the interpretative applicability of the same word in a different act and in a different context.[42]

Iacono made an erroneous inference from a 1982 amendment to the venue provision.[43] Following *Bougas*'s holding that state court venue for a national bank could be in any county in which the bank had a branch, Congress amended the relevant venue provision to limit venue to the location of the bank's principal place of business." [44] Congress, however, did not change section 1348 at that time. This congressional inaction, according to *Iacono*, meant that Congress implicitly approved of the *Bougas* Court's definition of "located" for purposes of section 1348.[45]

However, "no basis exists for inferring that Congress intended for 'located' in 28 U.S.C. [section] 1348 to be interpreted in accord with *Bougas*."[46] As *Firstar* observed, the venue and the jurisdiction statutes for national banks are

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[41]See *Atl. Cleaners & Dyers v. United States*, 52 S.Ct. 607, 608-09 (1932) ("Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.").

[42]*Bougas*, 98 S.Ct. at 93.

[43]See 12 U.S.C. [section] 94.

[44]*Firstar*, 253 F.3d at 992)

[45] *Iacono*, 785 S.Supp. at 33.

[46]*Firstar*, 253 F.3d at 992.

found in different acts and serve distinct purposes. [47] Further, there had been no cases prior to *Iacono* in 1992 suggesting that a national bank was a citizen of every state in which it had a branch. We are unwilling to infer from Congress's inaction with respect to section 1348 any intent to accept the *Bougas* definition of "located."

In *Iacono*, the district court maintained that because section 1348 used both "established" and "located," Congress must have intended for the two words to have different meanings.[48] The court then explained that this supported the holding that "established" meant principal place of business while "located" meant where the bank had branches.[49]

While the *Iacono* interpretation seems reasonable, it does not take into account that when Congress enacted the predecessor of section 1348, "established" and "located" would have been functionally equivalent for jurisdictional purposes because national banks had no branches.[50] As we have explained, national banks were not permitted to have interstate branches at the time of the 1882 and 1887 Acts that serve as the backdrop for section 1348. It is then difficult to conclude that Congress intended for the two words to have the different meanings that the *Iacono* court suggests. In any case, where it is not clear that the two words were intended to have different meanings, "the words should reflect the congressional goal of jurisdictional parity with state banks

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[47]Id.
[48]*Iacono*, 785 F.Supp. at 33.
[49]Id.
[50]See *Fin. Software Sys.*, 84 F.Suipp.2d at 604.

and corporations" rather than a meaning that overrides this goal.[51]

Horton makes a number of additional arguments, including the following: (1) Texas law determines that Bank One is a Texas domicillary, and thus a Texas citizen for diversity purpose; (2) since *Firstar,* the OCC has issued an interpretation of "located" that supports Horton's position; (3) certain sections in the National Banking Act use the term "located" to include location of branches; and (4) the *Firstar* result conflicts with Texas consumer protection laws and is bad policy.

The parties dispute which, if any, of these were properly raised before the district court. "[A}rguments not raised in the district court cannot be asserted for the first time on appeal."[52] However, "an argument is not waived on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it.[53] Regardless of whether Horton sufficiently raised these additional arguments, they are without merit.

First, Horton argue that *the Firstar* analysis ignores state law and its impact on the scope of diversity jurisdiction and does not account for federalism concerns. Horton specifically argues that under Texas law, Bank One is a Texas domiciliary and, therefore, cannot be divers. As the "determination of one's State Citizenship for diversity purposes is controlled by

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[51]Id.

[52]*In re Liljeberg Enters., Inc.*, 304 F.3d 410,427 n. 29 (5th Cir. 2002)

[53]Id.

federal law, not by the law of any state," Texas law does not control here.[54]

Second, Horton claims that since the *Firstar* opinion, the OCC has changed its position.[55] This argument lacks merit. The Corporate Decision upon which Horton relies was issued prior to an Interpretative Letter[56] that reaffirmed OCC's agreement with *Firstar*. Furthermore, the Corporate Decision concerns the location of national banks for purposes of mergers and does not purport to interpret section 1348 - or even refer to it.

Third, Horton points to portions of the National Banking Act that arguably deem a national bank to be located wherever it has branches; Horton contends that "located" in section 1348 must have the same meaning. The OCC readily concedes that "[f]or some statutes a national bank may . . . be located in states in which it has branches."[57] A "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning."[58] This principle does not apply here, however, because the statutes cited by Horton are from the National

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[54]*Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974)
[55]See OCC Corporate Decision No. 2001-29, 2001 WL 1502558 (Sept. 28, 2001).
[56]See OCC Interpretative Letter No. 952, 2002 WL 32072482 (Oct. 23, 2002)
[57]Id. at *3 n.8.
[58]*Gustafson v. Alloyd Co.*, 115 S.Ct. 1061, 1067 (1995) (emphasis added) (internal quotation marks and citations omitted).

Banking Act while section 1348 is found in the Judicial Code.[59] This argument also fails.

Finally, Horton argues that viewing "located" in a manner that increases the scope of federal diversity jurisdiction makes Texas consumer protection remedies "difficult or remote." The rule, however, is that "[c]ontrol over the scope of diversity jurisdiction rests with Congress," and any related policy determinations are for Congress to make.[60] Relatedly, state law does not determine the scope of federal diversity jurisdiction.[61] Horton's argument is, therefore, unavailing.

IV

We construe section 1348 in light of Congress's intent to maintain jurisdictional parity between national banks on the one hand and state banks and corporation on the other. We hold that the definition of "located" is limited to the national bank's principal place of business and the state listed in its organization certificate and its articles of association. This results in a national bank's having access to federal courts by diversity jurisdiction to the same extent as a similarly situated state bank or corporation. It follows that, under section 1348, a national bank is not necessarily "located" in each and every state in which it has a branch, and the district court did not err in so holding.

AFFIRMED.

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[59] *Firstar,* 253 F.3d at 990.
[60] *Bianca v. Park-Davis Pharm. Div. of Warner-Lambert Co.*, 723 F.2d 392, 396 & n.5 (5th Cir. 1984)
[61] Mas, 489 F.2d at 1399.